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Nos. 670 and 777

In the Supreme Court of the United States

October Term, 1959

Trans World Airlines, Inc., petitioner

v.

Dean Ada Lowry, Etc., et al.

Eastern Air Lines, Inc., petitioner

v.

Capt. Anthony Duff

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

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CITATIONS

Cases: Page

Aero Mayflower Transit Co. v. *United States*, 95 F. Supp. 258 4

American Airlines v. *Civil Aeronautics Board*, 192 F. 2d 417 13

Ashbacker Radio Co. v. *Federal Communications Commission*, 326 U.S. 327 2

Civil Aeronautics Board v. *State Airlines*, 338 U.S. 572 3

Delta Air Lines v. *Civil Aeronautics Board*, 228 F. 2d 17 8

Eastern Air Lines v. *Civil Aeronautics Board*, 271 F. 2d 752 ..... 4, 9, 10, 14

Federal Communications Commission v. *RCA Communications*, 346 U.S. 86 ..... 12, 13

Frontier Airlines v. *Civil Aeronautics Board*, 259 F. 2d 808 4

Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 13

Interstate Commerce Commission v. *Parker*, 326 U.S. 60 13

Lake Central Airlines v. *Civil Aeronautics Board*, 239 F. 2d 46 13

Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 14

M.I. O'Boyle & Son v. *Interstate Commerce Commission*, 206 F. 2d 473 4

National Airlines Inc. v. *Civil Aeronautics Board*, 249 F. 2d 13 ..... 4, 5, 9

New York-Florida Case CAB Order No. E-10884, decided December 21, 1956, 24 CAB 14

Norfolk Southern Bus Corp. v. *United States*, 96 F. Supp. 756, affirmed, 340 U.S. 802 14

Northwest Airlines v. *Civil Aeronautics Board*, 194 F. 2d 339 3

Seven States Area Case, CAB Order No. 13254, decided December 8, 1958, petition for review pending, *North Central Airlines* v. *Civil Aeronautics Board* (C.A.D.C., Case No. 14947) 15

United States v. *Pierce Auto Lines*, 327 U.S. 515 10

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 679

TRANS WORLD AIRLINES, INC., PETITIONER

v.

DELTA AIR LINES, INC., ET AL.

No. 777

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

The scope of the decision below [1] and of the grounds on which it rests is not altogether clear. For that reason the Government has not filed a petition for certiorari. If the decision is construed as resting on and restricted to the particular facts involved, review by this Court would not be indicated. On the other

[1] The decision (*Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, C.A.D.C.) (decided December 10, 1959), is set out in Appendix "B" of the petitions filed in both cases, Nos. 679 and 777. For convenience the decision set out at pages B1–B24 of the Appendix to the petition in No. 679 will be utilized throughout this memorandum and is referred to as "B—."

hand, if the Court should agree with petitioners that the decision enunciates general rulings of law as to the implications of the *Ashbacker*[1] rule in relation to route proceedings conducted by the Civil Aeronautics Board which will require substantial and unwarranted alterations in the Board's procedures, review by this Court would be justified. This memorandum sets out the views of the Government on the principal questions presented in the petitions.

1. The major questions raised by the two petitions are those arising out of the application to Civil Aeronautics Board route proceedings of the doctrine enunciated in *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327. The court below reversed an award to Trans World Airlines (TWA) of a route between St. Louis and various Florida points, because it appears to have believed that parties claiming that the grant would be mutually exclusive with their existing services or pending applications had been improperly deprived of a hearing in which to demonstrate such conflict (B14, 16, 20). TWA, petitioner in No. 679, asserts in effect that more was involved and that this decision casts doubt upon the Board's established practices for dealing with these matters. Eastern Air Lines (Eastern), petitioner in No. 777, appears to agree that substantive questions of law were decided and alleges that the court's action with respect to the TWA award (with which it agrees) was inconsistent with its refusal to take similar action with respect to an award made in the same

[1] *Ashbacker Radio Co.* v. *Federal Communications Commission*, 326 U.S. 327.

proceeding to Delta Air Lines (Delta) to fly between Memphis and Birmingham.

In view of the complex and widespread nature of the existing route structures of the various certificated airlines and the large number of applications for new or extended routes which such carriers normally have on file with the Board at any given time, serious procedural problems are involved in complying with the *Ashbacker* rule. If the grant of one application will require the denial of another, a comparative hearing before the Board is clearly required. *Northwest Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A.D.C.); cf. *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572.[3] A more difficult problem is raised, however, where there is an allegation that a particular application may be in conflict with another application for service between other points. A somewhat similar question may be raised where an application to provide service between two points is alleged to conflict, because of the economic impact of any grant, with existing service between two other points.

To avoid a chain reaction which would result in practically all trunk-line applications throughout the United States being consolidated with one another, the Board has adopted a policy of attempting to delimit the areas within which it will consolidate for hearing competing applications for new or extended routes.

[3] In the aviation field, the mutual exclusivity is not one of electrical interference, as in *Ashbacker*, but instead results from the economic limitations on the number of carriers which can be certificated to provide particular service requirements.

But such limitation does not resolve the question since a grant of a route within a defined area not only authorizes a carrier to provide service over that route, but, by a so-called "tacking" procedure, to combine the new route with existing routes for which the carrier is already certificated, thus making possible flights between points outside the area to which the hearing was confined and points newly certificated within the area.[4] To take care of these problems the Board has adopted a policy, approved by the courts of appeals,[5] under which it makes an informed preliminary determination as to

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[4] See *Frontier Airlines* v. *Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). The court below expressly relied upon *Frontier* as support for the proposition that in making an award "in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors" (B15, see also B24). And while the decision below contains language indicating that "evidence and findings" were required "if a transcontinental award was to be made" (B15) we do not construe this statement as necessarily proscribing any combinations of old and new routes in the absence of a positive Board finding that the public convenience and necessity so requires. We believe the court language, in context, was merely referring to the alleged lack of notice which "entitled" the interchange carriers "to a hearing on the possible existence of mutual exclusivity" (B16), rather than a rejection of the normal transportation rule, followed by the Board here and in all other cases, that a carrier is allowed to "tack" or combine old and new authorizations unless there are affirmative public interest reasons to the contrary. See, *e.g.*, *M. I. O'Boyle & Son* v. *Interstate Commerce Commission*, 206 F. 2d 473 (C.A.D.C.); *Aero Mayflower Transit Co.* v. *United States*, 95 F. Supp. 258 (D. Neb.).

[5] *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F. 2d 13 (C.A.D.C.); *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752 (C.A. 2), petition for writ of certiorari pending, case No. 785, this Term.

the validity of claims of mutual exclusivity. If it finds the claim to be prima facie correct, it either consolidates the two applications for comparative hearing or states it will condition the grant of any certificate issued to avoid the conflict by the imposition of stop or change-of-plane requirements, or by restricting or precluding carrier operation between specified intermediate points on the proposed routes. Under this procedure, in any case where it does not initially consolidate the allegedly conflicting applications or impose all restrictions requested, the Board provides in its hearing order that the parties claiming that mutual exclusivity will nonetheless exist will have a full opportunity to establish in the hearing that the granting of one or more of the applications would as a matter of economic fact preclude the grant of an application or applications that the Board has refused to consolidate. See *National Airlines* v. *Civil Aeronautics Board*, 249 F. 2d 13 (C.A.D.C.).

In the present case there were allegations that grant of TWA's application, because of its ability to "tack" service on existing routes between the West Coast and St. Louis to any St. Louis to Florida route it might secure, would conflict with an existing interchange service between the West Coast and Florida conducted jointly by National, Delta, and American, and also with pending applications (by these latter three airlines among others) for West Coast to Florida service along a Southern Transcontinental route through points in Texas and Louisiana. In addition,

Eastern alleged that both the TWA application and an application by Delta for service between Memphis and Birmingham would, because of their existing routes to the west of St. Louis and Memphis respectively, conflict with applications which Eastern had filed to extend its comprehensive existing service in the southeast westward from St. Louis and Memphis to the Pacific Coast and Kansas City. The Board, upon study of the pleadings, concluded that a conflict between TWA grant and the other services and applications might in fact exist.* To obviate this difficulty and at the same time preclude a general expansion of the already complex hearing, the Board specified that any new flights originated or terminated to the west of St. Louis would have to "be operated with, as a minimum, a scheduled stop at St. Louis" (J.A. 98). It also expressly stated that the parties to the hearing would be free to "advance at the hearing appropriate material bearing on the need for more stringent limitations" (J.A. 98, see, also, J.A. 93).

At the hearing evidence was introduced with respect to the effect of a TWA grant upon the existing southwest to Florida interchange service (see, *e.g.*, J.A. 208–211, 229–234) but no evidence was offered with respect to the effect of the grant upon the applications in the pending Southern Transcontinental case or in support of Eastern's claim as to the mutual exclusivity of its westward applications with those

* It reached no such conclusion with respect to the Delta application to extend its service from Memphis to Birmingham, but in any event required a stop at Memphis by Delta.

of either TWA or Delta. The Board in its decision awarding the grant to TWA (J.A. 500–501) considered the evidence introduced as to the impact of such an award upon interchange service (J.A. 494–496). Concluding that this impact would not be "so great as to require the denial to the traveling public of the service benefits accruing from the through-plane service via St. Louis proposed by TWA," it refused to impose any restriction, in addition to the one-stop restriction on that route (J.A. 496). And, while no evidence had been introduced on the matter, the Board went on to state (J.A. 497) that TWA service via St. Louis "would not in any real sense preclude a finding of public need for a more direct routing" in the Southern Transcontinental case. In petitions for rehearing, American, Delta, and National stressed the alleged conflict between the TWA grant and the applications in the Southern Transcontinental case. And Eastern in its petition for rehearing alleged for the first time facts purporting to show the inconsistency between the TWA and Delta grants and the grant of its own application for service west of St. Louis and Memphis. The Board rejected these claims as coming too late since they had not been established "at the hearing stage" (J.A. 646). It also rejected the claims of mutual exclusivity on their merits (J.A. 646–647, 651–652).

The court of appeals reversed, insofar as the claims of American, Delta, and National with respect to the Southern Transcontinental case and the interchange service were concerned, on grounds that allegations of

mutual exclusivity had been sufficient to warrant "a hearing on the possible existence of mutual exclusivity" (B16). Despite the express statement in the Board's hearing order affording just such a right to introduce evidence to the petitioners below (see p. 6, *supra*), and the fact that evidence had been introduced on the effect of a TWA award upon the interchange service, the court appears to have held that the Board had led the petitioners to believe that the transcontinental aspects of any TWA award was not in issue in the case—apparently because of the Board's refusal to broaden the proceeding to cover service between St. Louis and the West Coast. (B12–13, 14).

We think this determination of the court as to the lack of notice of the nature of the proceedings or the availability of the hearing to introduce evidence as to mutual exclusivity despite the St. Louis stop requirement was based on an erroneous reading of the record; its invalidity is emphasized by the fact that the court, in that part of the decision discussing Eastern's claims, refers (B20) to Eastern's "awareness that the issue of mutual exclusivity was open to it during all stages of the hearing * * *." But despite a reference by the court (B20) to its earlier decision in *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F. 2d 17 (C.A.D.C.),[7] we do not construe the decision as

[7] The earlier *Delta* case held, with respect to alleged conflicting applications *within* the general area under consideration in a Board proceeding, that the Board must either consolidate the applications for which a substantial claim of exclusivity is asserted or first make preliminary findings of non-exclusivity after separate hearings on that issue. The decision in this case was on a Motion for Stay and the subsequent mooting of the

requiring any departure from the Board procedures approved by the same court two years previously in the *National Airlines* case, *supra*—a case not mentioned in the decision here—and the Board may well be able to avoid the impact of the case by specifying its practice with even greater particularity in future cases.

Moreover, if the decision here is deemed to rest on the notice point, there is no necessary conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Eastern Air Lines* v. *Civil Aeronautics Board, supra.* The court here (1320) appears to be stating that although Eastern (which it concluded was on notice of its rights to introduce evidence as to mutual exclusivity) did not avail itself of the opportunity to offer evidence in support of its claim at the hearing, it had cured this defect by "refer[ring] to some facts on which it relied to show mutual exclusivity" in its petition for reconsideration (*ibid.*). The Court of Appeals for the Second Circuit, on the other hand, expressly held that a similar failure of Eastern to present evidence as to mutual exclusivity at the hearing in the proceeding there "* * * is fatal to Eastern's *Ashbacker* contentions * * * We hold that in an area proceeding where an applicant objects to exclusion of his application by a

case before final decision precluded an application for further review. The procedures therein indicated by the court have in fact not been followed by the Board, which has instead applied the procedures approved in *National* to cases involving allegedly conflicting applications both within and without the delimited area of a Board proceeding.

consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made" (271 F. 2d 752, at 757). We think the decision of the Second Circuit on this matter is clearly correct. *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 526–527 (see the Board's brief in opposition in No. 785). But since we do not read the opinion below as necessarily holding that the Board must consider allegations of mutual exclusivity raised for the first time on reconsideration where the Board makes it explicit that evidence thereon would be considered only to the extent it is adduced at the earlier hearing, it would appear that the problem can be resolved in that way.

2. Eastern objects (Pet. 777, pp. 19–24) to the distinction drawn by the court between its claim of mutual exclusivity with respect to the TWA grant (which the court honored at least to the extent of requiring further findings, B20) and its similar claims with respect to the Delta grant to fly between Memphis and Birmingham (which the court rejected, B20–22). We agree that Eastern's procedural rights are the same whether the alleged conflict is between applications for transcontinental service or between routes covering smaller distances (here in essence the routes between Kansas City and Florida points). But, unlike Eastern, we do not regard the court's opinion as necessarily establishing any procedural double standard dependent upon the court's evaluation of the geographical extent of the alleged conflict. Instead, the court's language (B21) distinguishing between "adding a little additional segment outside the

area" from "awarding a transcontinental certificate in a limited area case" appears to have been directed towards the quite different question of whether the Board, in delimiting the area within which it would consider applications, properly excluded Eastern's Kansas City to Memphis application. For the conclusion the court reaches on the basis of the distinction between the two situations is merely that "the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment" (*ibid.*). The reason the court gave for rejecting Eastern's claim of conflict between its out-of-area application and the Delta application for service between Memphis and Birmingham, is that the resulting Delta route between Kansas City and Florida, through Memphis and Birmingham, would be merely "one of many combinations of routes available to Eastern from Kansas City to Southeast points" and that "to consider this one route separately would be to [improperly] require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications" (B22). We think this determination is an obviously correct one.

3. Eastern argues (Pet. 777, pp. 12–17) that the Board's determination that additional service, competitive with that already furnished by Eastern, was necessary on the routes awarded TWA and Delta was erroneous because the Board failed to "make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity" in the markets involved (*Id.* at 2). Its position appears

to be that unless the Board makes these precise dollars and cents forecasts in determining that competition over the routes in question is economically feasible, it cannot make an informed "judgment" that the making available of such competition will serve the public convenience and necessity. See *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86. We think the court below was clearly correct in finding "these contentions to be without merit" (B22–23) in the light of "findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area" (B23).

The Board must, of course, consider the economic feasibility and impact of competition, and reasonable estimates by the parties are valuable and are taken into account in this respect. As the court indicated, however, full consideration was afforded here both to the question of economic feasibility and the submissions of the parties, and numerous findings were made by the Board.* But while the Board must find with

* The Board, among other things, set forth the 1957 data in relation to traffic moving between St. Louis and the Southwest and intercity traffic moving along the route (J.A. 486–487) and predicated growth therein (J.A. 487). The examiner found that Delta's traffic estimates were in general accord with established methods of computing such matters; he generally accepted them (J.A. 381); and the Board adopted the examiner's findings (J.A. 485–486). The Board further found that "the record amply demonstrates that the operations of a second carrier can be economically supported without adverse effect on existing

sufficient clarity that the competition is in the public interest after consideration of all relevant data of record, there is no ritualistic formula for setting out the required findings as Eastern contends. On the contrary, it has long been recognized that prediction of future traffic and costs is not an exact science, that the Board need not make future projections in these areas with mathematical precision (*American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.)), and that its basic findings need be made only "with sufficient elaboration to enable the court to relate the evidence to them." *Lake Central Airlines* v. *Civil Aeronautics Board*, 239 F. 2d 46, 49 (C.A.D.C.). The Board was not required to withhold certification because Eastern having been found deficient in the past now promised more service. *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86, 96–97; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 69, 70; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514–515. The Board having considered and discussed

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carriers" (J.A. 487), and the examiner's report sets forth the various cost and revenue estimates of the applicants, including those of TWA (J.A. 351–357), which obviously were accepted as being within the zone of reasonableness. There was a dollar estimate of diversionary effect on Eastern (J.A. 655), together with findings that the diversion would not injure Eastern and also that the traffic growth would tend to sustain Eastern's revenues despite a reduction in its percentage participation in the market (*id.*). As to the Delta award, the Board found service deficiencies which could be remedied with "negligible" impact on Eastern in the light of various restrictions imposed on the award (J.A. 655), and again there were cost and traffic estimates submitted by Delta (J.A. 332–343).

all pertinent economic issues, the law requires no more. See, *e.g., Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 193; *Norfolk Southern Bus Corp.* v. *United States,* 96 F. Supp. 756 (E.D. Va.), affirmed, 340 U.S. 802.

4. Eastern's final reason for seeking certiorari—the alleged invalidity of the Board's practice of publicly announcing its tentative vote in major proceedings at the time it gives instructions to the staff to prepare a decision in accordance therewith (Pet. 777, pp. 24–31)—clearly presents no matter warranting review here. The Board, in order to prevent "leaks" as to the nature of its proposed actions to some of the interested parties therein, has followed this practice since 1956. See CAB Order No. E–10884 in the *New York-Florida Case* (decided December 21, 1956) 24 CAB ——. As the Court of Appeals for the Second Circuit stated in rejecting a similar claim in *Eastern Air Lines* v. *Civil Aeronautics Board,* 271 F. 2d 752, at 758:

> * * * Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

Th Court of Appeals for the District of Columbia Circuit in the instant case agreed—not even finding it necessary to comment on the Eastern contentions. The suggestion that a tentative vote prior to drafting the final decision in a case precludes or in any way prejudices the ability of a Board member to reach a different conclusion subsequently is obviously unsound. And the inhibiting effect of a public announcement by the Board itself as to the tentative vote obviously is no greater than where such vote becomes known throughout the trade through unofficial trade sources.*

Respectfully submitted.

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* Thus, in the *Seven States Area Case*, CAB Order No. 13254, decided December 8, 1958, petition for review pending, *North Central Airlines* v. *Civil Aeronautics Board* (C.A.D.C., Case No. 14947), the Board by a press release of May 19, 1958 announced its tentative vote to award a route to Ozark Air Lines, but in its final decision awarded the route to North Central Airlines.

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